SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 229.

MERCHANTS' NATIONAL BANK OF BALTIMORE,
APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement of the Case.

The claimant below, a national banking association, brought this suit to recover the sum of $4,713.01, being the amount which it had paid from time to time between January, 1888, and July, 1904, as taxes assessed by the Treasurer of the United States upon the average amount of its notes in circulation, in excess of the taxes lawfully due. After trial the Court of Claims dismissed the petition, and the claimant appealed. The facts found by the Court of Claims are these:

The claimant was organized as a State bank in 1834 under an act of the General Assembly of Maryland. On June 7, 1865, it was converted into, and has since then existed as, a national banking association (*Finding I*, p. 4). Its capital stock is, and at all times has been, $1,500,000 (*Finding II*, p. 4). From the time of its conversion until July 1, 1887, it had notes in circulation to an amount exceeding five per centum of its chartered or declared capital

(*Finding III*, p. 4). The average amount of its notes in circulation during each half year between July 1, 1887, and June 30, 1904, is set forth in Findings IV to VIII (pp. 4-6). It appears that during some of these periods the average amount of its said notes was less than five per centum of its capitalization. For every half year between July 1, 1888, and June 30, 1904, the Treasurer of the United States assessed against the claimant, upon the average amount of its notes then in circulation, a tax or duty at the rate of one-half of one per centum. The taxes so assessed were paid by the claimant. Payments covering the half-yearly periods during which the average amount of its notes in circulation was less than five percentum of its capital stock, amounted to $4,713.01 (*Findings IX-X*, pp. 6-7). On November 17, 1904, the claimant made application to the Treasurer of the United States, in conformity with law (Sec. 5218, Revised Statutes), showing that it was not liable to be taxed upon its circulation for the half years during which the average amount thereof had been less than five per centum of its capitalization and demanding the refund of the taxes levied and collected for those periods. On March 11, 1905, the application was refused (*Finding XI*, p. 7) and on June 29 this suit was brought.

The taxes in controversy were assessed by the Treasurer, who assumed to act in conformity with Sec. 5214, Revised Statutes, which provides:

> "In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year upon the average amount of its notes in circulation." * * *

At the trial the claimant contended that its liability to such taxation was limited by an express provision of Sec. 3411, Revised Statutes, which reads:

> "Whenever the outstanding circulation of any bank, association, corporation, company or person is

> reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation." * * *

Also that the exemption from taxation made by Sec. 3411 was extended to circulating notes issued by national banking associations, by Sec. 3417, Revised Statutes, which reads:

> "*The provisions of this chapter, relating to the tax on the* deposits, capital, and *circulation of banks,* and to their returns, *except as contained in sections* thirty-four hundred and ten, *thirty-four hundred and eleven,* thirty-four hundred and twelve (thirty-four hundred and thirteen) and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, *shall not apply to associations which are taxed under and by virtue of title 'National Banks.'*"

The court below, holding that Sec. 3411 did not apply to the taxation of circulating notes of national banks or limit the liability of such banks to taxation under Sec. 5214 (pp. 7-13), entered judgment for the defendant (p. 14).

ASSIGNMENTS OF ERROR

The errors of the Court of Claims assigned by the appellant and intended to be argued are as follows:

1. The said court erred in holding and deciding that the claimant, being a national bank, was not exempt from taxation on its notes in circulation during the half-yearly periods when the average amount of its said notes was less than five per centum of its chartered capital.

2. The said court erred in holding and deciding that Sec. 3411, Revised Statutes, relates solely to the taxation of the outstanding circulating notes of State banks which had

ceased to exist or had been converted into national banks, and did not limit the claimant's liability to taxation on its own outstanding circulation.

3. The said court erred in dismissing the petition.

ARGUMENT.

I.

The sections of the Revised Statutes drawn in question are without inconsistencies or ambiguities. They must be enforced in accordance with their terms. Resort to the acts of Congress, in which they had their origin, for purposes of interpretation, is not permissible.

The Court of Claims resorted to the original legislation dealing with the taxation of banks through the imposition of duty upon their notes in circulation. It then proceeded to interpret the sections of the Revised Statutes in the light of this antecedent legislation, and reached the conclusion that Sec. 3411, Revised Statutes, did not apply to the circulation of national banks and did not limit the operation of Sec. 5214, Revised Statutes. The court said (p. 13):

> "While courts in the construction of acts appearing in the Revised Statutes are precluded from referring to antecedent legislation upon the same subject to 'create an ambiguity,' they are not so precluded to 'solve' an existing one."

The claimant—while conceding that the provisions of the acts of Congress (*act of June* 30, 1864, 13 *Stat. L.*, 223, *amended by act of March* 3, 1865, *Sec.* 14, 13 *Stat. L.*, 484), which were carried into the Revised Statutes as Secs. 3407-3417, did not, *when and as originally passed*, relate to national banks or to the circulation of national banks, but related to State and private banks—contends, nevertheless,

that the language of the Revised Statutes under consideration (chapter 8 of title 35) is clear and wholly free from ambiguity, and in plain, direct, and unequivocal terms extends the provisions of Sec. 3411, Revised Statutes, to national banks and the taxation of their circulating notes so as to exempt such circulation from taxation when the same does not exceed five per centum of the capital of the issuing bank.

It is settled by a long and unquestioned line of cases and text-book authority that the Revised Statutes must be treated as a legislative declaration by Congress of what the statute law of the United States was on December 1, 1873, on the subjects they embrace, and that when the meaning of the language employed is plain the court cannot look to the statutes which have been revised to see if Congress erred in that revision.

United States v. Bowen, 100 *U. S.*, 509.
Arthur v. Dodge, 101 *U. S.*, 34.
Victor v. Arthur, 104 *U. S.*, 498.
Myer v. Car Co., 102 *U. S.*, 1.
Cambria Iron Co. v. Washburn, 118 *U. S.*, 57.

In Rose's Notes on the U. S. Reports it is said (pp. 860-861):

> "Revised Statutes are legislative declaration of statute law on subjects embraced on December 1, 1873, and original statutes can only be looked to when necessary to construe doubtful language therein."

In *The Bates Refrigerating Co. v. Sulzberger*, 157 *U. S.*, 30, the court, quoting with approval the language of Wallace, J., in *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 35 *Fed. Rep.*, 134, 137-138, said:

> "The real inquiry is whether the section (Revised Statutes, Sec. 4887) limits the term of a domestic patent to the term of a foreign patent. * * * If it were proper to treat this question as an original

one, it would be necessary first to inquire whether there is any ambiguity in the language of the statute. If there is not, the duty of the court is to give effect to the obvious meaning, notwithstanding it may be thought to make an unreasonable and harsh innovation upon the pre-existing privileges of our own inventors. It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the court to do so. Where the meaning of the Revised Statutes is plain, the court cannot look to the sources of the revision to ascertain whether errors have or have not been committed by the revisers."

It was said also (pp. 36-37):

"In our judgment the language used is so plain and unambiguous, that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden v. Barney,* 72 *U. S.,* 107, 111, 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes. 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature.' * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."
Denn v. Reid, 35 *U. S.,* 524, 527.

Hamilton v. Rathbone, 175 *U. S.,* 418, contains an ex-

haustive review of the authorities, and in conclusion the court announced the following doctrine:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity. If paragraph 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. * * * The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon that subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

Cheney v. State, 74 *Northeastern Rep.,* 892, 893 (1905):

> "We have attempted to show that the reasons assigned on appellant's behalf for a narrowing of the act of 1903 are not of any real weight, but, as the act under review is plain, we do not think it is really a case for construction. Where the language of a statute is clear and unambiguous, it must be held to mean what it plainly expresses (*Lewis' Sutherland, Statutory Construction,* § 367; *Endlich, Interp. of Statutes, Sec.* 4). *The whole effort of appellant's counsel has been expended in the endeavor to create an uncertainty in the act of* 1903, *not from the words of the act, but from a consideration of prior enactments.* To adopt this reasoning would be a violation

> of the rule above stated. As laid down by the Supreme Court of the United States in *Hamilton v. Rathbone,* 175 *U. S.,* 414, 421; 20 *Sup. Ct.,* 155, 44 *L. Ed.,* 219: 'The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to to solve, but not to create, an ambiguity.' "

Relying upon these well-settled principles, the claimant rested its claim upon the clear and unmistakable meaning of the language found in Sec. 3411, made more emphatic and unmistakable by the provisions of Sec. 3417 (*supra*).

It is impossible to find in the language of these two sections, or either of them, any word of obscure or doubtful meaning, or even the slightest, trace of ambiguity. Nor is there in the body of the chapter of the Revised Statutes under which these sections are ranged a single word, section, or provision which tends to modify in the slightest degree the force or meaning of the language employed in the sections referred to.

On the contrary, chapter 8, of which these sections are part, is entitled "Banks and Bankers," and the first section of the chapter (Sec. 3407) defines the "banks and bankers," which are included in and subject to the provisions of the chapter, as follows:

> "*Every* incorporated *or other bank* * * * shall be regarded as a bank or as a banker."

That the language of this defining section is broad enough to include national banks cannot be questioned.

That national banks were, in fact, included within its terms, and were intended to be, and recognized by Congress as being so included, is conclusively shown by the enactment of Sec. 3417 at the end of chapter 8, whereby it expressly provided, as above quoted, that the provisions of this chapter relating to the circulation of banks and to their returns, except as contained in Secs. 3410, 3411, 3412, 3413,

and 3416, shall not apply to associations which are taxed under and by virtue of title "National Banks."

Unless all meaning is to be denied the language of these provisions, it follows that in enacting a chapter of laws to operate upon "banks and bankers" Congress has at the outset declared that the provisions of the chapter shall apply to *"every* incorporated, *or other bank"*; that in the body of the laws so enacted Congress has declared that whenever the outstanding circulation of *any bank* shall be reduced to an amount not exceeding five per centum of its capital such circulation shall be exempt from taxation, and, finally, that the exemption from taxation so provided shall apply to national banks.

It is submitted that no clearer or more emphatic language could be found to express the legislative will, and that the reasonable force of the language used in Sec. 3411, taken in connection with the whole of the chapter of which it is a part and the accepted canons of interpretation, leaves room for no other construction than that, whatever may have been the scope of antecedent legislation, from and after the adoption of the Revised Statutes, national banks were included within the exemption from taxation contained in Sec. 3411.

In the brief and in the argument on behalf of the Government in the court below it was conceded that, so far as concerned the language employed in the Revised Statutes above referred to, there was no word or expression of doubtful meaning. In this connection the learned counsel for the Government made the following admission in his briefs:

> "There is, perhaps, no word or expression in said section (3411) which is in and of itself of doubtful meaning. The court is, therefore, not called upon to construe the language of the statute, which it may safely be conceded is clear, plain and unambiguous" (*Defendant's Brief in Court of Claims*, p. 2).

So also in the opinion of the Court of Claims it was conceded that the language of the Revised Statutes under consideration was not *per se* doubtful or ambiguous, but the court, nevertheless, permitted itself to refer to the prior acts from which the Revised Statutes were taken for the purpose of showing that it was the intention of Congress to limit the Revised Statutes to the cases named in such prior acts.

It is earnestly contended that, upon these conceded facts, this case falls squarely within the rule of construction repeatedly announced by this court as applicable to the Revised Statutes, namely, that "where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it" (*Hamilton v. Rathbone*, 175 *U. S.*, 419). Accordingly, the court is precluded from looking into prior acts to ascertain the meaning or scope of the Revised Statutes.

II.

The words and context of the Revised Statutes in question are fairly susceptible of but one meaning, namely, that the liability of national banks to taxation under Sec. 5214, Revised Statutes, is limited by Sec. 3411. They should be administered accordingly. But, whether taken by themselves or construed in connection with the antecedent legislation, the intention of Congress to extend the exemption prescribed by Sec. 3411 to national bank circulation is equally clear.

Even if Sec. 3411 be construed in connection with antecedent legislation, it must still be held to include the circulation of national banks within the five per cent. exemption contained in the section.

Upon this branch of the case the question is whether or not, when Congress carried the provisions of this antecedent legislation into the Revised Statutes, it adopted as a principle of general application to the circulation of all banks

the principle upon which it had acted when it exempted from taxation the circulation of State banks when reduced below five per centum of their capitalization. To determine this question, it is necessary to ascertain the reason for, and the principle reflected in, the original law. The reasons for the exemption and the principle upon which it rested are to be found in the change in existing conditions brought about by the legislation contained in the act of March 3, 1865 (13 Stat. L., 486), whereby Congress, in pursuance of a policy then for the first time adopted, effectually prohibited and restrained the use of notes issued by State banks as a medium of circulating currency. To accomplish this end a tax of ten per centum was imposed upon each and every such note used for circulation and paid out by any bank, State or national (act of 1865, chap. 78, Sec. 7).

In the face of such a tax no bank could afford to use or pay out the notes issued by State banks, and, as the tax also applied to the case of a bank paying out its own notes, it resulted, as a necessary consequence of said legislation, that State banks could neither issue new circulating notes nor use for circulation notes which had been issued before the passage of the act.

The immediate result of this legislation was that a large volume of State bank circulation, which had been issued prior to the act of 1865, at a time when the issue of such circulation was permitted without restriction and which was outstanding at the time said act was passed, had to be retired from circulation by the banks which had issued the same.

In the meantime, however, outstanding State bank circulation was subject to a tax of one-twelfth of one per centum each month, or one per centum per year, which tax had been levied upon the average amount of such circulation by the act of June 30, 1864, for the purpose of raising internal revenue.

This tax was levied when State bank notes were a recognized medium of circulating currency and before Congress determined to put an end to the further use of the same as

such. The only purpose of the tax was to raise revenue, and it was calculated upon the average amount of circulation *issued* by a bank, and hence was payable by the issuing bank and collectible by the Government as long as any part of the circulation which had been *issued* remained outstanding.

When, therefore, Congress put an end to the further issue of State bank circulation and effectually compelled the reduction or retirement of such circulation as had been already issued and was outstanding and at the same time retained in operation the aforesaid revenue tax calculated on the average amount of notes issued by State banks, the justice and propriety of establishing some limitation upon the payment of the revenue tax in favor of banks, which, presumably, would have to reduce their outstanding circulation to the minimum, was considered by Congress; and in dealing with this question Congress assumed that banks affected by the act of 1865 would reduce their outstanding circulation as far as the same was capable of being reduced, and that such proportion thereof as was not reduced or retired presumably had disappeared and no longer existed for purposes of taxation or otherwise.

To meet these conditions, therefore, and upon this theory, Congress, in Sec. 14 of the act of March 3, 1865, amended and limited the provisions of the act of 1864, relating to the tax on the circulation of State banks, and provided that "whenever the outstanding circulation of any bank," &c., "shall be reduced to an amount not exceeding five per cent. of the chartered or declared capital, existing at the time the same was issued, such circulation shall be free from taxation."

It is true that at the same time and in the same amendment Congress also made provision for the conversion of State banks into national banks, and provided in such case a similar limitation and exemption as was provided for the reduction of the circulation of State banks which should not be so converted, but the two provisions, standing together in the same law, evidently were intended to afford the

relief from taxation aforesaid, both as to State banks which should be converted and as to State banks which should not be converted, the condition of the exemption in either case being that the outstanding State bank circulation should be reduced to an amount not exceeding five per cent. of the capital.

It will thus be seen that the principle upon which Congress proceeded rested upon the assumption that, in the case of State banks, five per cent. represented an amount of circulating notes which might reasonably be expected to be lost or destroyed, and accordingly that when the outstanding circulation of such banks had been reduced to an amount not exceeding five per cent. it would be presumed, for the purposes of the law taxing outstanding circulation, that the entire amount of circulation issued had been retired.

The principle upon which the exemption rested, therefore, must be taken as expressing the legislative policy in respect to the proper and appropriate method of assessing banking circulation for taxation and as being a part of the general scheme provided by Congress for levying and collecting such taxes.

It must be presumed that when the Revised Statutes were enacted Congress was apprised, not only of the scope and meaning of the previous law, which it carried into the Revised Statutes, but also of the policy and intent thereof and of the reasons which originally led to the passage of the same. Congress must be presumed, therefore, to have known the reason and theory which had led to the enactment of the five per cent. exemption of banking circulation from taxation, the specific conditions which it was designed to meet, and the kind of circulation to which it originally referred, and, further, to have known that mainly, if not entirely, as a result of the previous legislation in question, national bank circulation had superseded State bank circulation and had become the recognized form of currency of the country. With full knowledge of these facts Congress de-

liberately enacted, under Sec. 3411 of the Revised Statutes, the provisions of the previous law, exempting the outstanding circulation of any bank from taxation when the same was reduced to an amount not exceeding five per cent. of its capital, and we are called upon to determine whether, as carried into the Revised Statutes, Congress intended this exemption to apply to a kind of circulation which then no longer existed and to a state of facts which had long since been fully accomplished, or whether Congress did not mean to extend the principle of tax exemption, as expressed in the provisions, to the kind of circulating currency which it found in existence at the time of the passage of the Revised Statutes. It must be conceded that the percentage of bank notes likely to be lost or destroyed in circulation is at least as great in the case of national banks as of State banks, and therefore that theoretically the principle of the exemption is equally as appropriate to the one kind of circulation as to the other.

Apart from the plain meaning of the language of the Revised Statutes, which has already been referred to in this brief, we find additional evidence of an intention on the part of Congress to enlarge the application of the antecedent legislation. As carried into the Revised Statutes, the language of Sec. 3411 differs from the language of the previous law in one particular which is, at least, noteworthy. As originally enacted the provision read: "Whenever the outstanding circulation of any bank," &c., "*shall be* reduced * * * it shall be exempt from taxation." In Sec. 3411 this language was changed to read: "whenever the outstanding circulation of any bank," &c., "*is* reduced * * * it shall be exempt from taxation."

It must be assumed that the change in language aforesaid was made for some practical purpose, and that the language of the previous law did not adequately express the legislative meaning at the time of the revision. The change from the future to the present tense naturally and necessarily im-

plies a purpose on the part of Congress to adopt and apply the principle involved in the previous legislation to conditions existing at the time of the revision. The radical difference which existed between the conditions at the time of the original enactment and at the time of the revision was that the reduction of circulation from the causes originally contemplated had long since been fully accomplished, and no circulation of the kind originally contemplated remained in existence, but all of such circulation had been superseded by circulation issued by national banks. If, then, Congress did intend to continue in force the policy of the law exempting a certain proportion of banking circulation from taxation, and intended, as the change in language would imply, to apply that policy to the only kind of circulation in existence at the time of the revision, it must necessarily have intended that the exemption contained in Sec. 3411 should, from and after the revision, apply to national bank circulation.

Other and even more significant changes of form and language found in the provisions of the antecedent law, as carried into the Revised Statutes, make it clear beyond question that in passing the Revised Statutes Congress did intend to extend, and did, in fact, extend, the provisions of Sec. 3411 to the circulation of national banks.

As already pointed out, the legislation carried into the Revised Statutes under chapter 8 of title 35 (Sec. 3407-3417) was taken from the act of June 30, 1864 (13 *Stat. L.*, 223), amended by the act of March 3, 1865 (13 *Stat. L.*, 486), and again amended by act of July 13, 1866, chapter 184.

In each of these acts the banking institutions to which the legislation therein contained related were enumerated to be every "bank, association, company, corporation, or person engaged in the business of banking."

But, notwithstanding the broad and comprehensive language of this enumeration, Congress was not dealing with *every* bank, but with every bank *except* national banks, and accordingly we find in each of the acts in question an express

proviso declaring that nothing therein contained should apply to national banks. It is very evident that the proviso aforesaid was thought necessary, because, without an express exception, national banks would clearly have been included in the language of the enumeration above referred to.

When Congress revised and re-enacted this antecedent legislation, it made it the subject of a separate chapter and carried it into the Revised Statutes as chapter 8 of title 35, under the caption "Banks and Bankers."

The first section of this chapter (Sec. 3407) defines the terms "banks and bankers" as follows:

> "Every incorporated or *other* bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon by draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

This definition is not found in any of the previous laws, and was framed and enacted for the first time in the Revised Statutes. It is apparent that the language used is designed to comprehend and include every possible phase of the banking business, and to extend to every banking institution. It was enacted by Congress with full knowledge of the scope and effect of the less general and comprehensive definition contained in the previous laws and of the fact that even in respect to that definition it had been thought necessary, in every case, expressly to qualify the same by proviso excluding national banks from its operations.

Congress must have known, therefore, that unless similarly qualified the far more comprehensive language of the new definition of the Revised Statutes would certainly extend to and include national banks.

And in section 3417—the concluding section of the chapter, enacted for the purposes of this chapter and not found in any previous law—Congress declared in unmistakable language that national banks were included in the defining section, and were, in consequence thereof, subject to the several provisions of the chapter, unless expressly excluded therefrom, and among the provisions which Congress thus expressly declared should apply to national banks was the exemption from taxation contained in Sec. 3411.

In the face of this clear evidence of legislative intent, it would be the merest speculation to attribute any different intention to Congress than the intention which the language and the context plainly express.

In the exercise of an undoubted power Congress has seen fit to declare, as a part of the policy of the general banking law, that whenever the outstanding circulation of any bank is reduced to an amount not exceeding five per centum of its capital it shall be exempt from taxation, and to say that the principle upon which the exemption rests is as applicable to one kind of circulation as another. It is submitted, therefore, that it is beyond the power of the courts to limit or qualify the provision thus carefully made, but that the same must be given full force and effect. It cannot even be urged that the legislation in question was inadvertently enacted by Congress, for in 1878, when the Revised Statutes of 1873-'74 were before Congress for amendment, we find that chapter 8 was again considered, and that Sec. 3417 was actually amended so as to subject national banks still further to the provisions of the chapter, and as so amended the legislation has continued unchanged to the present day.

In conclusion, therefore, it is respectfully submitted that, in whatever view Sec. 3411 be considered, whether standing alone or taken in connection with the context of the chapter to which it belongs or whether read in the light of antecedent legislation, it must still be held that it applies to and includes the circulation of national banks so as to exempt such circu-

lation from taxation when the same is reduced to an amount not exceeding five per centum of the capital.

III.

The construction placed by the court below upon Sec. 3411, Revised Statutes, is not tenable, for the reason that it would render Sec. 3416 nugatory. The result of such a construction would be an unjust discrimination against the circulation of national banks.

It is conceded that Sec. 3417 extended the benefits of Sec. 3411 to national banks, and the case turned upon the question as to what were the benefits so extended. The claimant contended that the provisions of Sec. 3411 were of general application relating to the circulation of *all* banks and banking associations, and intended to afford the relief from taxation therein provided to *all* banks generally; but the Court of Claims held that, notwithstanding its general language, the provision did not relate to "any bank, association, corporation, company, or person," but only related to "any bank, association, corporation, company, or person *which has been, or shall be, converted into a national bank.*"

The conclusion of the Court of Claims resulted from the assumption that, inasmuch as in the original law the provisions of Sec. 3411 followed immediately the provisions of Sec. 3410 as part of the same sentence, it drew its meaning from the language of Sec. 3410.

As the consequence of this assumption it was held that the general language of Sec. 3411, namely, "any bank, association, corporation, company, or person," was restricted by more particular language of Sec. 3410, namely, "any bank or banking association which has ceased to exist, or which has been or shall be converted into a national bank;" and, deriving its meaning from the particular and specific language aforesaid, the court held that Sec. 3411 must be lim-

ited in its application to such banks as had ceased to exist or had been or should be converted into national banks.

In order to warrant such a principle of construction, which wrests the words of the section from their ordinary and literal meaning, it must clearly appear that Congress intended the provision to apply to the same subject-matter and to the same conditions as were treated in the preceding section, namely, to the case of banks ceasing to exist or becoming converted into national banks, and intended in such case to provide an exemption from taxation in respect to the circulation issued by the defunct State bank when it should be taken over and succeeded by a national bank.

Apart from any other objection to the construction so adopted by the Court of Claims, it violates an accepted principle of construction, in that it renders altogether nugatory the provisions of the succeeding section of the very same act in which Sec. 3411 originally stood.

That act (of March 3, 1865, Sec. 14, 13 Stat. L., 486) consisted of a single sentence, divided into three clauses, connected by the conjunction *"and."*

> "That the capital of any State bank or banking association which has ceased, or shall cease to exist, or which has been or shall be converted into a national bank, for all the purposes of the act to which this is an amendment, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid. And whenever the outstanding circulation of *any bank,* association, corporation, company, or person shall be reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation. And whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, such national banking association, shall be held to make the required return and

payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association."

The first clause of this act was carried into the Revised Statutes as Sec. 3410, the second clause as Sec. 3411, and the third clause as Sec. 3416.

It is clear from a mere reading of the original law that the concluding clause makes particular and specific provision for the identical thing which the Court of Claims held to be the subject-matter of the provisions of Sec. 3411, namely, it provides in express terms for exempting from taxation the outstanding circulation of State banks and banking associations which have been converted into national banks.

It follows, therefore, that to restrict by construction the general language of Sec. 3411, as applied to national banks, to the circulation of State banks which have been converted into national banks would result in making it identical in substance and effect with the provisions of Sec. 3416, and as a necessary consequence of such construction it must be held that both at the time of the original enactment and at the time of the revision Congress deliberately enacted in the same law two provisions identical in effect and relating to the same subject-matter.

If the construction of the Court of Claims is right, either Sec. 3411 or Sec. 3416 is mere surplusage and altogether nugatory, both as they stand in the Revised Statutes and as they stood in the original law.

In order to arrive at its construction the Court of Claims treated the first two clauses of the original act as composing a single sentence, and altogether ignored the concluding clause of the same sentence, and it requires no argument to sustain the proposition that if it were permissible to refer at all to the original legislation it must be considered as an entirety and not in detached sections.

An additional objection to the construction adopted by the Court of Claims is found in the consequences resulting therefrom viewed in the light of existing conditions. If the five per cent. exemption from taxation was to be confined to the circulation of State banks which have been converted into national banks, then as to all other banks, associations, corporations, companies, or persons (many of which were incapable of becoming converted into national banks) the liability to pay the tax on their outstanding circulation would continue forever, so long as any part of such circulation remained outstanding, a result totally inconsistent with the theory upon which the exemption was founded, that approximately five per cent. of bank notes are lost or destroyed in circulation, and hence incapable of retirement.

Upon any principle of construction, therefore, it is submitted that the Court of Claims erred in restricting the general language of Sec. 3411 to the particular case of national banks succeeding State banks by conversion, and that, rightly construed, Sec. 3411, as it stood in the original law, extended to any and all State banks an exemption from taxation upon their circulation when the same was reduced to an amount not exceeding five per cent. of the capital, and that the exemption aforesaid proceeded upon the assumption that five per cent. of outstanding circulation was lost or destroyed.

It must result, therefore, that when Congress carried this general principle of tax exemption into the Revised Statutes, and in express terms provided that the benefits of the principle should be extended to national banks, it thereby intended to apply to the circulation of national banks the same principle which it had theretofore applied to the circulation of State banks. Any other construction would involve a direct discrimination in that regard against national banks.

IV.

The statutes drawn in question being free of doubt or ambiguity, the contemporaneous construction, if any, placed upon them by the executive officers whose duty it was to enforce them is not material.

In the opinion of the court below, but not elsewhere in the record, it is stated that the practice followed by the Treasury Department for many years with respect to the assessment and collection of taxes upon the circulation of national banks has been to treat Sec. 5214, Revised Statutes, as complete in itself and not limited by the exemption prescribed by Sec. 3411 (p. 13). It is undoubtedly the rule that in case of doubt or ambiguity in the terms of a statute courts will favor a construction given it by the executive officers of the Government department charged with its enforcement. If such construction be acted upon for a number of years, courts look with disfavor upon any change. But it is equally true that it is only in cases of doubt or ambiguity that such contemporaneous construction becomes material (*U. S. v. Tanner,* 147 *U. S.,* 661). A departmental regulation, no matter how long it may have been followed, cannot operate as a repeal of a statute, and that a department's construction of a statute is never binding upon the courts or parties where the law itself is free of doubt and ambiguity and the executive construction is in conflict with the plain terms thereof (*United States v. Alger,* 152 *U. S.,* 384, 397-398; *Webster v. Luther,* 163 *U. S.,* 331-342; *Studebaker v. Perry,* 184 *U. S.,* 258, 268-269).

The sections of the Revised Statutes with respect to the taxation of the circulation of national banks (*supra*) are without ambiguity. Their interpretation cannot be controlled or influenced by the practice of the Treasury Department.

V.

The claim in suit is not barred by limitation.

The eleventh finding of the Court of Claims is to the effect that the claimant, on November 17, 1904, stated an account and made application to the Treasurer of the United States, requesting a refund of the monies paid in excess of the taxes lawfully due, and that the Treasurer refused said request in a letter to the claimant dated March 11, 1905. This suit was brought June 29, 1905.

Under the law (*infra*) the claim in suit accrued on March 11, 1905, when the Treasurer rejected the claimant's demand for refund. The question of limitation was not alluded to by the Court of Claims, and is mentioned here in order to forestall any doubt on the subject that may arise in the mind of this court. Sec. 5218, Revised Statutes, contained in the title "National Banks," reads:

> "In all cases where an association has paid or may pay in excess of what may be due or has been found due from it on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which on being certified to the Treasurer of the United States and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury."

The case comes within the rule stated in *Harrison v. U. S.*, 20 *Ct. Cl.*, 176, and *Simon v. U. S.* 19 *Ct. Cl.*, 601.

VI.

The payment of the taxes in question without protest did not preclude the claimant from showing that they were excessive and demanding the return of any sum paid in excess of the lawful tax.

The payments in dispute were made to the Treasurer of the United States as a tax or duty assessed by him, assuming to act in conformity with law. Failure to pay the duties assessed would have made the appellant liable to the penalty prescribed by Sec. 5217, Revised Statutes. The fact that the payments were not accompanied by protests does not render them voluntary or preclude the appellant from recovering any sum paid in excess of the lawful tax. This is a general rule, applicable to the reclamation of money unlawfully exacted as internal taxes (*Swift & Courtney Co. v. U. S.*, 111 *U. S.*, 22). Again, where payments have been made by national banks in excess of sums collectible as duty on their circulating notes, it is not material whether the payments were voluntary or not. The right to demand and obtain the refund of such excesses is given the banks by Sec. 5218, Revised Statutes, quoted above. Under that law the right exists by virtue of the excesses of payment alone, and no protest against the tax assessed and paid or any other proceeding, except an application for refund, is essential to its creation or preservation.

JAMES H. HAYDEN,
R. E. LEE MARSHALL,
J. HANSON THOMAS,
Of Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 20.

THE MERCHANTS NATIONAL BANK OF BALTIMORE,
APPELLANT,

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

THE MERITS OF THE CASE.

The Court of Claims held that the exemption from taxation contained in Section 3411, R. S., was intended to cover the tax imposed upon the circulation of State banks taken over and assumed by National banks upon their conversion into a national bank, and not upon the circulation of a national bank as such. (p. 10.)

In reaching this conclusion the Court proceeded upon the theory that in the legislation contained in the Act of March 3, 1865 (in which R. S., Section 3411 first appears as part of Section 14), the fundamental and controlling intention of Congress was "to diminish the existence of State banks

and encourage, if not compel, their conversion into national banks." (p. 10.)

The legislative intent to diminish the existence of State banks appeared, it was held, in Section 6 of the act of March 3, 1865:

> "That every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any State bank, or banking association, paid out by them after the first day of July, 1866."

The legislative intent to encourage the conversion of State banks into National banks appeared, it was held, in Section 7 of the same act:

> "That any existing bank, organized under the laws of any State, having a paid up capital of not less than $75,000, which shall apply before the first day of July next (i. e., *July* 1, 1865) for authority to become a National bank * * * shall, if such bank shall be found by the Comptroller to be in good standing and credit, receive such authority in preference to new associations applying for the same."

Accepting these provisions as a declaration of intention on the part of Congress, first, to diminish the existence of State banks, and, second, as indicating the manner in which State banks should be diminished, namely, by "encouraging, if not compelling, their conversion into National banks," the Court of Claims concluded that in the subsequent legislation relating to the revenue tax on the capital and circulation of State banks contained in Section 14 of the same act, Congress had in view only the operation of State banks becoming converted into National banks in accordance with the assumed meaning and intent of the provisions of Sections 6 and 7 (supra), and, accordingly, the Court of Claims limited and restricted the language of Section 14 to the

notes of State banks outstanding at the time of their conversion into National banks.

In this construction, it is respectfully submitted, the Court of Claims was wrong.

The ten per cent tax, contained in Section 6, was not directed against the *"existence"* of State banks, or any other banks, but against the *circulation* of any banks other than national banks.

It was intended to restrain the issue of circulation by all banks—(including State banks)—except National banks, and at the same time to compel the reduction and retirement from circulation of the currency, which had already been issued by such banks, and to this end it imposed such a tax upon the "paying out," or, in other words, the use of such currency, as effectually to restrain its circulation, and compel its reduction and retirement.

The circulation of banks to be affected by this legislation was that of *all* banks of issue, other than National banks, including so-called State banks, that is, banks organized and existing under special or general State banking laws; and also unincorporated banking associations, and companies and individuals doing a banking business.

Having in mind the fact that at the time of the enactment of the legislation under consideration, circulating notes could be, and were, in fact, issued and emitted without restriction by any banking institution, incorporated or unincorporated, State banks as well as other banks, it is clear that the purpose and object of the ten per cent tax upon the use of circulation issued by such banks, was not to "diminish the existence" of the banks issuing the circulation, but to diminish the outstanding circulation of such banks, and to restrict the further use of such circulation.

Nor in enacting Section 7, supra, did Congress intend to encourage, or even to permit, all of the banks affected by the ten per cent tax contained in Section 6, to become con-

verted into National banks. Section 7 was, in terms, limited and restricted to "any existing bank, *organized under the laws of any State*, having a paid up capital of not less than $75,000," and it provided that the applications of such banks to become National banks, if made before the first of July next succeeding the date of the Act (i. e., before July 1, 1865; the Act being the Act of March 3, 1865), should be preferred to new associations applying for the same.

The true meaning of this provision is found by referring it to the existing provisions of the National Banking Act (Sec. 44 and Sec. 7; Act of June 3, 1864) relating to the conversion of State banks into National banks.

By Section 44 of that Act, it was provided:

> "That any bank *incorporated by special law or any banking institution organized under a general law of of any State* may by authority of this Act become a National association under its provisions. * * * Provided, however, that no such association shall have a less capital than the amount prescribed for banking associations under this Act."

And by Section 7 it was provided:

> "That no association shall be organized under this Act with a less capital than $100,000, nor in a city whose population exceeds 50,000 persons, with a less capital than $200,000."

Read in connection with these provisions, and considered in the light of the legislative purpose expressed in Section 6, supra, to restrain the issue of circulation by any existing banks except National banks, the meaning and intent of Section 7, supra, is clear. It enlarged the provisions of the National Banking Act relating to conversion—for a limited time, however—for the benefit of some of the banks, about to be deprived of the right to issue circulation, by

reducing the amount of capital required of banks authorized to become converted.

But, even as amended, the right of conversion did not extend to all the banks affected by the ten per cent tax contained in Section 6, nor even to all State banks, but only to banks incorporated under special or general State law, and of these, only to such banks as had the requisite capitalization—i. e., $100,000 or $200,000, under the National Banking Act, and from July 1, 1865, $75,000, as provided by Section 7, supra.

No other banks of issue, except those enumerated, were entitled to apply for, or to receive authority to become converted into National banks, and hence, all banks, associations, corporations, companies, or persons engaged in the banking business, except State banks and State banking associations having a certain prescribed capital, were excluded from the privilege of becoming converted into National banks, although all such institutions were subject to the ten per cent tax contained in Section 6, and to the consequences and effect thereof upon their outstanding circulation.

It is clear, therefore, that the controlling and fundamental purpose of Section 7, supra, imposing the ten per cent tax upon the use of circulation issued by any and every bank, other than a National bank, was to restrain in whole, or in part, the use of such circulation as a part of the currency of the country.

At the same time, and as an incident to the operation of this provision, Congress modified for a limited time the requirements of the National Banking Act, relating to the conversion of State banks, for the purpose of affording to a greater number of such banks an opportunity to become converted, and with the evident expectation that the right of conversion would be freely exercised as a result of the

restrictions imposed upon the use of all circulation other than National bank circulation.

In the legislation under consideration, therefore, it may be said that one of the objects of Congress was to encourage the conversion into National banks of those State banks, which, having the required capital, were authorized by the National Banking Act, as modified by Section 7, supra, to become converted as aforesaid.

But this object was merely incidental to the main purpose of effecting and bringing about a reduction and retirement of the circulation of *all banks of issue,* other than National banks, and this was the fundamental and controlling purpose and object of the ten per cent tax.

The ten per cent tax had to do with circulation generally, and was not confined in its operation to the particular circulation issued by State banks.

The right of conversion into National banks was, however, expressly confined to certain State banks, and was not available to any other kind of bank.

The Act of June 30, 1864, imposed a revenue tax of one-twelfth of one per centum each month upon the average amount of circulation of *all banks,* other than National banks, and it also imposed a revenue tax of one-twenty-fourth of one per centum each month upon the average amount of capital of *all banks* other than National banks.

The conditions created and put into operation by the ten per cent tax above referred to affected the operation of the revenue law of June 30th in respect to the tax levied by that law upon capital, and, more particularly, upon circulation.

As to circulation, all the banks whose outstanding circulation was subject to the revenue tax collected under the Act of June 30th were compelled, as a practical result of the ten per cent tax imposed by the Act of March 3, 1865, to reduce and retire such outstanding circulation, and the oper-

ation of the ten per cent tax upon the use of the circulation of such banks was so extensive that the process of reduction would, it was expected, sooner or later, extend to all outstanding circulation capable of being retired.

The revenue tax upon circulation levied by the Act of June 30, supra, was calculated and paid upon the average amount of circulation *issued* by the banks, but not all of the circulation *issued* by a bank is capable of being retired.

Moreover, having in view the volume of circulation issued by the banks affected by the ten per cent tax, and outstanding at the time of its enactment, the process of reduction would necessarily extend over a considerable period of time, and in view of this fact, the revenue tax upon outstanding circulation imposed by the Act of June 30th continued to be enforced and collected during the period such circulation was in process of reduction.

As far as it affected the general scheme of circulation, contemplated by the Act of June 30, 1864, the ten per cent tax of March 3, 1865, looked to and contemplated the ultimate reduction of such circulation, as far as the same was capable of reduction, such circulation, in the meantime, however, continuing to pay the revenue tax imposed by the Act of June 30th, supra. Assuming, as a general proposition, that some portion of bank currency is lost, or destroyed, or otherwise disappears, in circulation, and, hence, is incapable of reduction or retirement, it would follow that under the provisions of the Act of June 30th, which calculated and collected the tax on outstanding circulation upon the average amount of circulation *issued* and treated, for the purposes of the tax, all circulation which had been *issued* as outstanding, it would follow, that unless provision were made to the contrary, banks which had reduced their circulation as far as possible under the compulsion of the ten per cent tax, would nevertheless remain liable, *ad infinitum*,

to the revenue tax on a part of their circulation which presumably would cease to exist.

This condition so arising out of the operation of the ten per cent tax applied with equal force and effect to *all* of the banks whose circulation was affected by the ten per cent tax, whether they became converted into National banks, or not; and it was to meet this condition, and to extend relief in the premises to all of the banks which, it was assumed, would proceed to reduce and retire their circulation in consequence of the ten per cent tax aforesaid, that Congress in Section 14 of the Act of March 3, 1865, supra, amended the revenue law of June 30, 1864, by providing: "That whenever the outstanding circulation of any bank, association, corporation, company, or person, shall be reduced to an amount not exceeding five per cent of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation."

At the same time and in the same section Congress further amended the Act of June 30, 1864, aforesaid, in order to provide for and cover the particular conditions arising from the anticipated conversion of State banks into national banks, so far as such conversion affected the provisions of that Act relating to the collection and payment of the taxes on the capital and circulation of the State banks so becoming converted.

The National bank act, supra (Act of June 30, 1864, Sec. 7), provided that no association should be *organized* under its provisions with a less capital than $100,000, or in cities of over 50,000 inhabitants, with a less capital than $200,000.

Section 7 of the Act of March 30, 1865, provided that any State bank having a capital of not less than $75,000 which applied before the first day of July next ensuing, *should receive authority* from the Comptroller *to become a National bank* in preference to new associations.

But in order to *organize* and *become* a National bank under the provisions of the National Bank Act, it was never-

theless necessary to comply with the requirements of that Act in respect to capital, as aforesaid, and to this end, it was necessary for the State bank, having received the necessary authority to increase its capital, when such capital was less than $100,000 or $200,000 as provided for by the Act, before it could become a national bank.

So also it necessarily resulted that the corporate existence of the State bank ceased and terminated as soon as a conversion was actually accomplished.

Dealing with these incidents of conversion as they related to and affected the procedure provided by the Act of June 30, 1864, supra, for the collection and payment of the taxes on capital and circulation, Congress further amended that Act to meet conditions arising out of the conversion of, and ensure the payment of such taxes as had accrued or should accrue on the capital of the State bank prior to conversion, and on the circulation issued by the State bank as such and outstanding at the time of conversion, and to this end it was provided (Sec. 14, Act March 3, 1865, supra): "That the capital of any State bank, or banking association which has ceased to exist, or shall cease to exist, or which has been or shall be converted into a National bank, for all the purposes of the Act to which this is an amendment, shall be assumed to be the capital as it existed immediately before such bank ceased to exist, or was converted, as aforesaid. * * * And whenever any State bank or banking association has been converted into a National banking association, and such National banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, such National banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association."

Read in the light of existing conditions, created and brought into operation by the 10 per cent tax provided in

Sec. 6 of the Act of March 3, supra, the meaning, purport and intent of the several provisions of Section 14 of that act are clear and unmistakable.

The section as a whole purports to be, and is, an amendment of the Act of June 30, 1864, which Act lays a general and uniform tax or duty upon the deposits, capital and circulation of every bank, association, corporation, company or person, other than a National bank.

The second paragraph of the amending act provides a general and uniform exemption from the tax or duty upon the circulation aforesaid in favor of every bank, association, corporation, company or person, other than a National bank.

The other two provisions of the amending act relate to particular and specific conditions peculiar to a single class of the banking institutions enumerated in the original law and are designed to maintain the uniform operation of the taxes levied by the original law, upon the capital and circulation of State banks exercising the right of conversion into National banks, so long as the said capital and circulation of such banks are susceptible of taxation under the original act.

It follows, therefore, that the construction of Section 14, supra, adopted by the Court of Claims which proceeded upon the theory that the exemption from taxation provided in the section was intended "to cover the tax imposed upon the circulation of State banks taken over and assumed by National banks, upon their conversion into a National bank" was wrong. Rightly construed, the exemption aforesaid is of general application, co-extensive in terms and in operation with the provisions of the law laying the tax to which it relates.

Assuming this construction to be correct, we have, in 1865, and from and after the creation of the exemption, a law imposing a uniform tax or duty upon the average amount of circulation of all banks except National banks,

and providing a uniform exemption from the tax aforesaid, whenever such outstanding circulation should be reduced to an amount not exceeding five per centum of the capital of the issuing bank.

In the Act of 1866, ch. 184, approved July 30th (14 Stat. L., 136), we find these provisions, both as to the tax on circulation and as to the exemption therefrom, adopted and re-enacted in terms, and again by express proviso, National banks are excluded from the operations of both provisions.

From 1866 until the adoption of the Revised Statutes in 1873 the legislation referred to remained unchanged.

Both the law imposing the circulation tax and the law providing the exemption therefrom were carried into the Revised Statutes, the former as Section 3408, and the exemption as Section 3411, each of the provisions being then for the first time separated into distinct sections and treated as separate integral parts of the general scheme of taxation covered by the chapter under which they were ranged.

But in so revising and re-enacting the provisions of this legislation, Congress extended some of its provisions to and excluded some of its provisions from National banks. It provided in Section 3417 that Section 3408 levying the tax therein provided for on the deposits, capital and circulation of banks other than National banks should *not* apply to National banks, *but at the same time it provided that Section 3411 theretofore providing a general and uniform exemption from the tax so levied upon the circulation of banks other than National banks, should then and thereafter also apply to National banks.*

In so doing Congress obviously must have assumed that the principle and theory which the exemption expressed in respect to the reduction of the circulation of banks other than National banks was of equal force and application in respect to the reduction of the circulation of National banks, and, while carefully and by express provision, continuing to

confine, as theretofore, the operation of the provisions of the chapter imposing the tax on circulation to banks other than National banks, Congress at the same time with equal care, extended to National banks the benefit of the general and uniform provision of exemption created by Section 3411 in case of a reduction of circulation.

Assuming this to be correct it follows that from and after the enactment and adoption of the Revised Statutes of 1873, Section 3411 no longer depended upon a circulation issued by banks other than National banks for a subject matter upon which to operate, nor upon the continued existence of the tax or duty upon such circulation, since the section also was made applicable, by virtue of Section 3417 to the circulation of National banks, and to the tax or duty imposed upon their circulation by the provisions of the National bank act.

Even if the circulation, and with it the tax on circulation, to which it exclusively related prior to the Revised Statutes should disappear, Section 3411 would not thereby be deprived of its vitality, because the Revised Statutes extended and applied it also to the circulation and tax on circulation of National banks.

And in point of fact this very condition has arisen. There is no circulation in existence other than National bank circulation. Section 3408 which imposed the tax on circulation to which the exemption originally referred was superseded and abrogated by the Act of February 8, 1875, Chapter 36, Sec. 19, which provided in lieu thereof a tax on circulation of an altogether different character, in regard to which the principle of exemption as contained in Section 3411 was wholly repugnant and inconsistent.

The abrogation of Section 3408, as aforesaid, therefore, and the entire disappearance of any circulation, other than National bank circulation, would leave Section 3411 deprived of any force or vitality, unless it applied to National bank circulation, and yet we find the section set out, adopted

and recognized as existing, vital legislation in every publication of the banking laws of the United States from the revision of 1873 to the present day.

It appears in the Revised Statutes of 1879 (Chapter 8, Sec. 3411). In the United States Statutes Compiled in 1901 Chapter 8, Sec. 3411). In Pratt's Digest of the laws relating to National banks (1905) after setting out the section in terms as a part of the National Bank Act, it is said:

> "This section refers to State as well as National banks."

In Magee on the law of National and State banks (1906), at pages 604-605, Section 3411 is set out and treated as a part of the provisions of the National Bank Act dealing with the tax on circulation of National banks, and as such is made to immediately follow Section 5214 of the National Bank Act imposing a tax upon the circulation of National banks. In Gould on the National Bank Act (1904), Section 3411 is likewise considered and treated as a part of the National Bank Act, and as such is made to follow Section 5218 of that Act, which provides for the refund of taxes by the Treasurer, in all cases where an association has paid, or may pay, in excess of what has been or may be found due from it, on account of the duty required to be paid.

It is, therefore, submitted that upon any theory of construction, Section 3411 must be held to apply to and cover the tax on the circulation of National banks.

In their brief (p. 20) counsel for the United States state that this is a "class case" and that there are pending in the court below some sixty claims, involving about $250,000. We do not deny that this is true, although the statement has no foundation in the findings of the court below. We do, however, strenuously deny that the fact if true should influence the court

in its determination of this case. If, as we have endeavored to show, and firmly believe we have shown, that the assessment and collection of duties upon the claimant's notes in circulation, when their amount was less than five per centum of the claimant's capitalization, was contrary to law, and that the sum in dispute represents payments of duty in excess of the duties imposed by law, this claimant must recover. Other claimants similarly situated must likewise recover. Congress has made provision for the restitution of moneys in the Treasury paid by national banks in excess of the duties collectible from them. If the government has made it a practice to assess and collect duties in excess of those warranted by law, it is an unconscionable thing to suppose that this court would give its sanction to such an illegal practice (*Prosser vs. Finn*, 208 *U. S.*, 67, 74). As well might a defaulter plead that he had defrauded a large number of persons and the aggregate amount of his defalcations being large, he would be put to inconvenience if compelled to make restitution. For the government to offer such a plea is neither agreeable to good conscience, nor an admirable example to citizens of the country, who are entrusted with money belonging to others.

NO PART OF THE CLAIM IN SUIT IS BARRED BY LIMITATION.

Counsel for the United States contend, in their brief (pp. 20-21), that in so far as the claim in suit relates to duties or taxes which were assessed and paid, prior to June 29, 1899, it is barred by limitation, the petition herein having been filed on June 29, 1905. It is argued that the limitation of six years for the bringing of suits against the United States, prescribed by Section 1069 of the Revised Statutes, began to run on the dates of the several payments made by the claimant. This contention is not new. It appears to have been raised by counsel for the United States in a large number of cases, where, as in the present case,

claimants were seeking to recover money erroneously and illegally exacted from them by the government, upwards of six years, prior to suit, without regard to the dates when causes of actions accrued to such claimants. In all of these cases this court and the Court of Claims have held, without exception, that the limitation begins to run only when a right of action accrues to the claimant, and that where money has been wrongfully and unlawfully exacted of a person by the government, and the law provides that it shall be refunded to him upon his application, by an executive officer of the government, no cause of action accrues until an application for refund, made in conformity with law, has been refused. It does not seem possible that this court can now depart from a ruling so eminently sound and just.

In the present case the claimant shows that from time to time, between January, 1888, and July, 1904, the Treasurer of the United States, assuming to act in conformity with Sections 5214 and 5215 of the Revised Statutes (Act of June 3, 1864), assessed against the claimant, and collected from it certain sums as duties upon its notes in circulation in excess of the duties imposed by law. Section 5218 of the Revised Statutes (Act of March 2, 1867) provides:

> "In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury."

In conformity with this section, claimant, on November 17, 1904, did state an account of the sums claimed to have been paid in excess of the duties lawfully payable and made

application to the Treasurer of the United States for refund. This application was refused on March 11, 1905. Upon its refusal, the claimant's right of action accrued and not before.

United States vs. Taylor (104 *U. S.*, 216). This was an action brought for the recovery of the proceeds of a tax sale of certain land owned by claimant's decedent. The sale was made by the board of direct-tax commissioners on May 4, 1865, for a sum largely in excess of the tax, costs of sale, and penalties. The government collected and retained the whole of the proceeds of the sale. The claimant brought his action pursuant to Section 36 of the act of August 5, 1861 (12 *Stat. L.*, 304), which provided:

> "But in all cases where the property liable to a direct tax under this Act may not be divisible, so as to enable the collector, by a sale of part thereof to raise the whole amount of the tax, with all costs, charges and commissions, the whole of such property shall be sold, and the surplus of the proceeds of the sale, after satisfying the tax, costs, charges and commissions, shall be paid to the owner of the property, or his legal representatives; or, if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant."

On January 15, 1874, claimant's decedent made application to the Secretary of the Treasury for payment of the surplus of the proceeds of the sale which remained after deducting therefrom the tax, penalty, and costs. This application was rejected on January 17, 1874, and suit was brought on December 8, 1875, over ten years after the date of the sale. The United States set up the statute of limitations,

but the Court of Claims gave judgment for claimant. On appeal this court said:

> "The second question raised by the appeal is, whether the Court of Claims had jurisdiction of a suit for the proceeds of land sold for taxes, when the application to the Secretary of the Treasury and the bringing of the suit therefor, were both more than six years after the sale.
>
> "By section 1069, U. S. Revised Statutes, it is provided that every claim against the United States cognizable by the Court of Claims shall be forever barred, unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues.
>
> "Under the 36th section of the Act of 1861 the surplus proceeds of the sale of land for taxes was required to be deposited in the Treasury, to be there held for the use of the owner or his legal representatives, until he or they should make application therefor to the Secretary of the Treasury, who, upon such application, should, by warrant on the Treasury, cause the same to be paid to the applicant.
>
> "This section limits no time within which application must be made to the Treasury for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. Whenever the owner of the land or his legal representatives should apply for the money, it was the duty of the Secretary to draw his warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an indefinite period of time without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.
>
> "A construction should be given to these statutes which would be consistent with good faith on the part of the United States. It would certainly not be fair

dealing for the government to say to the owner of lands sold for taxes that the surplus proceeds should be held in the Treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover such proceeds, to plead in bar that the demand therefor had not been made within six years.

"The general rule is, that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own and not subject to the trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the Statute of Limitations will begin to run against him from the time such knowledge is brought home to him, and not before.

"In analogy to this rule, the right of the owner of the land to recover the money which the government held for him as his trustee, did not become a claim on which suit could be brought and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued. As the suit was brought within six years from the date of demand, it falls within the terms of the section giving jurisdiction to the Court of Claims, and is not cut off by the lapse of time."

The effect thus given section 36 of the Act of August 5, 1861, was in conformity with the well established rule of construction "that every statute for the continuance of which no time is limited is perpetual, although it be not expressly declared to be so" (*Dwariss on Statutes,* 150).

Section 5218 of the Revised Statutes, under which this claimant made its application for refund of the moneys paid in excess of the duties required by law, like Section 36 of the Act of 1861, does not limit the time within which application for refund may be made, and, therefore, as the court held in the Taylor case, the right to make such an application was not limited by lapse of time or any

statute of limitation, and the claimant's right of action first accrued when its application was refused.

The case of *Simons vs. United States* (19 *C. Cls.*, 601), was an action to recover a sum collected by direct-tax commissioners, from an owner of land. On May 6, 1865, the money was paid without objection or protest. On August 23, 1882, a claim was made for refund of a part of the sum paid on the ground that it was exacted without warrant of law. The Secretary of the Treasury, to whom the claim was presented, referred it to the Court of Claims, after the claimant had agreed that the reference should not be treated as a waiver of the statute of limitations. The statute under which the claim was made provided:

> "Section 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively, and such appropriations shall be deemed permanent annual appropriations.
>
> * * * * * * * * * *
>
> "To refund to persons money collected from them without warrant of law, as in payment of dues under the direct-tax laws."

The court held that the money in dispute "was collected without warrant of law," and said:

> "The claim, therefore is one for which the law provides a permanent appropriation, and concerning which the Revised Statutes in effect declare the policy of the government to be that moneys collected by its agents under the direct-tax laws which are not really taxes, that is to say, which were 'collected without warrant of law,' shall always be refunded, and the refunding shall not be dependent upon annual appropriation acts. Thus far the policy of the government is clear, and the intent of Congress unquestionable.

"The Joint Resolution, 25th February, 1867 (14 Stat. L., 568, Sec. 4), more explicitly provided: 'That the Secretary of the Treasury shall be authorized to refund to persons from whom money has been received without warrant of law, as in payment of dues under the direct-tax laws, the sums so illegally collected; such refunding to be ordered on the presentation, in each case, of satisfactory evidence of the illegal collection.' It is not altogether clear that the application for a refund must first be made to the Secretary of the Treasury before suit can be brought; but it is clear, as was said by Mr. Justice Woods, in Mrs. Irene Taylor's case (*supra*), of a section of another statute: 'This section limits no time within which application must be made to the Treasury for the proceeds of the sale. The Secretary was not authorized to fix such a limit. Whenever the owner of the lands, or his legal representatives, should apply for the money, it was the duty of the Secretary to draw his warrant therefor, without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an indefinite period of time, without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.' And we may add, in the language of the same learned judge: 'A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the government to say to the owner that the surplus proceeds should be held in the Treasury for an indefinite period for his use, or that of his legal representatives, and then, upon suit brought to recover them, to peal in bar that the demand therefor had not been made within six years.' When Congress appropriate money generally, as for the annual expenses of the government, no legislative intent can be inferred to renovate a claim or class of claims barred by the statute of limitations. But when Congress appropriate money for the

payment of a designated claim or class of claims already barred by the statute of limitations it must be inferred that the legislative intent was to give a new promise founded upon the old consideration. In such cases the statute of limitations begins to run from the enactment of the appropriation act. So when Congress give legal efficacy to a designated claim or class of claims which were not legal rights, or which were rights without a remedy, it must be intended that the newly created claims should accrue from the passage of the enabling act or from the happening of some event prescribed therein."

* * * * * * * * * * *

"Now, in the direct-tax cases like the one at bar the claimants were without right or remedy till the joint resolution 1867 came to give them both. Manifestly, therefore, claims which were virtually created by a joint resolution did not accrue at the previous time when the money was collected without warrant of law.

"When, then, did they accrue? The joint resolution named no time, but provided for the happening of an event, viz., their presentation to the Secretary of the Treasury, and upon the happening of that event each claim accrued. The joint resolution was merged in the Revised Statutes, but it cannot be said that the statute of limitations should then begin to run, for manifestly there was no intent to change the usage or impair the rights of parties. We must, therefore, fall back upon the words of the Supreme Court concerning a surplus in the Treasury derived from tax sales, and say: 'The person entitled to the money could allow it to remain in the Treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years he was not required to sue for it within that time.'"

The case of *Harrison vs. United States* (20 *C. Cls.*, 175), was an action to recover money which had been exacted by direct-tax commissioners as interest upon the tax assessed. The tax, with interest, was paid May 25, 1865. Applica-

tion for a refund was not made until the lapse of more than six years after date of payment, and the petition, setting forth the claim, was filed some time after the refusal of the application. The United States denied that the sum paid was in excess of the tax lawfully assessable and interest collectible thereon, and also set up the statute of limitations, but the court held that the money in dispute was exacted without warrant of law, and with respect to the statute of limitations said:

> "The counsel for the defendants has also asked the court to review its decision concerning the statute of limitations, and he has pointed out what is deemed by him a just distinction between this and the case of Irene Taylor (104 U. S., 216).
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> "The court has accordingly reconsidered the question, and states the following as its conclusions:
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> "1. When a right of action exists it must be held that a 'claim first accrues' (Rev. Stat., Sec. 1069), and the statute begins to run from the moment when the claimant may bring his action either upon the entire demand or upon any portion or installment which has become due. Such are the ordinary cases of contract which come before this and all other courts of law.
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> "2. When no right of action exists, and a claimant has no remedy save that of appealing to the justice and clemency of Congress, and Congress pass an enabling act which gives to a claimant or class of claimants a legal right concerning a designated claim or class of claims, the statute of limitations ordinarily begins to run from the passage of the enabling act. Such are the Mail Transportation Cases under the act of 1877, where the services were rendered before the war, and such are the claims of officers who served in the Mexican war for the three months' extra pay given by the act of 1879.
>
> "But these Direct Tax Cases belong neither to the one nor the other of the above classes. The claimants acquired no right of action by the payment of the money illegally exacted, and therefore the statute of limitations did not begin to run from that date. The Joint

Resolution, 25th February, 1867 (14 Stat. L., 568, Sec. 4), was general in its terms and prospective as well as retroactive in its benefits. Therefore, the date of its enactment could not furnish a starting point which should apply equally to all claims, those that already existed and those that might thereafter arise.

"But the relief given seems to the court much like that given by the Act, 5th August, 1861 (12 Stat. L., 292, Sec. 36), to the owner of real property for a surplus derived from a tax sale. Both statutes relate to money in the Treasury derived through tax proceedings, as to which the government asserts no legal or equitable title. The act provides that the surplus shall be 'held for the use of the owner or his legal representatives until he or they shall make application therefor to the Secretary, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant.' The joint resolution provides that the Secretary 'shall be authorized to refund to persons from whom money has been received without warrant of law the sums so illegally collected; such refunding to be ordered on the presentation in each case of satisfactory evidence of the illegal collection.' The trust is declared in the act, but it is implied in the joint resolution. Under the one statute the money is to be 'paid' on the 'application' of the claimant; under the other it is to be 'refunded' on the 'presentation' of the claim. In both the legislative purpose is the restitution of money in the Treasury which the government cannot in equity and good conscience retain.

"With this close analogy before us we feel warranted in following the reasoning of the Supreme Court in the Taylor case and in adopting its conclusion."

THE CLAIMANT WOULD BE ENTITLED TO THE REFUND DEMANDED, EVEN THOUGH THE PAYMENTS HAD BEEN MADE VOLUNTARILY. THEY WERE, HOWEVER, NOT VOLUNTARY PAYMENTS.

In their brief (p. 21) defendant's counsel contend that

the claimant is not entitled to recover, alleging that the payments drawn in question were made voluntarily, under a mutual mistake of law. That contention is without foundation, either in fact or law. Section 5218 of the Revised Statutes (Act of March 2, 1867) provides:

> "In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury."

The right thus created is not made dependent upon any protest or exception reserved by claimant at the time of payment. The right to refund exists by virtue of payment by a national bank of monies in excess of the duties imposed by law and the presentation of a statement, in conformity with the statute. To quote the language of the Court of Claims in the Harrison case (*supra*): "The legislative purpose is the restitution of money in the Treasury which the government cannot in equity and good conscience retain."

But the payments in question were not made voluntarily, as will be seen from the sections of the Revised Statutes which relate to the assessment and collection of duties from national banks. These are:

> "Sec. 5215: In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe of the average amount of its notes in

circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

"Sec. 5216: Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

"Sec. 5217: Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due on the bonds deposited with him by such defaulting association."

In the present case the claimant made its returns to the Treasurer in January and July of each year, as required by Section 5215, and in each return showed the average amount of its notes in circulation for the period of six months, next preceding. Had the claimant omitted to make such returns, or had it failed in any return to state the average amount of its notes in circulation, it would, forthwith, have become liable to the penalty prescribed by the last sentence of Section 5215, and its tax would have been assessable, not upon the *average* amount of its notes *in circulation*, but upon the *total* amount of notes *delivered to it by the Comptroller*, which, in addition to those in circulation, would have in-

cluded notes in its own vaults, not yet issued, or temporarily withdrawn from circulation. (Sec. 5216.)

If the claimant had failed to pay the duties as assessed by the Treasurer of the United States, it would have become, "a defaulting association," within the meaning of Section 5217, and the Treasurer would have been authorized to deduct an amount equal to the duties unpaid and penalties imposed, from the interest payable to the claimant on its United States bonds deposited with the Treasurer. Hence it was not only to avoid liability for the penalties prescribed by law, but also to obtain payment of interest belonging to it, that the claimant paid the duties. In addition to these things it cannot be doubted that the claimant would have suffered irreparable injury through loss of credit if it had refused to pay the duties as assessed. Under such circumstances the payment of taxes, assessed illegally, has never been held voluntary.

In *Simons vs. U. S.* (19 *Ct. Cls.*, 601), the United States made a contention very similar to the one now under consideration, but the court said (pp. 607-608):

> "The tax was paid without protest or objection, and the counsel for the government contends that it was a voluntary payment, made in mistake of law, which cannot be recovered back.
>
> "It is conceded that, as to personal property, the payment of an illegal tax is not deemed voluntary, though made without protest, but it is said that as to real property, where the owner can always bring his action of ejectment, the rule is different. Without stopping to inquire whether the rule generally is different, we are of the opinion that the principle applicable to cases like this is the same. Where a man is obliged to pay an illegal tax to obtain possession of his property, whether it be personal or whether it be real, the payment is involuntary.
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> "This case indeed seems to the court analogous in

every part of the Proclamation Cases (De Bow *et al.*, 11 Ct. Cl., 672; affirmed 13 Id., 562), where this question of voluntary or involuntary payment was considered. There the officers of the government had acquired possession of the claimant's property lawfully. In the belief that they had a statutory right to charge him a license fee for bringing it into New Orleans, they required him to pay one, and he paid without objection, but to obtain possession of his property. Here the officers of the government likewise had acquired possession of the claimant's property (his house) lawfully; and, in the belief that they had a right to charge him the ten per cent interest they required him to pay it, and he paid without objection, but to obtain possession of his property. In the words of Baron Martin in *Steele vs. Williams* (20 *Eng. L. & Eq. R.*, 319), *'To call such a payment a voluntary payment is an abuse of language.'*"

Swift & C. & B. Company vs. United States (111 *U. S.*, 22): The claimant in that case sued to recover certain commissions alleged to be due on the purchase of proprietary stamps under the internal revenue law. It appeared that the company had settled with the internal revenue department from time to time, and it was held that such settlements did not bar it from its right to recover, although in making the settlements there was, at the times thereof, no distinct objection, notice or protest. It was contended by the government that the matter was closed by the voluntary action of the parties, but this court decided otherwise, saying:

"It appears that prior to June 30, 1866, the leading manufacturers of matches * * * made repeated protests to the officers of the Internal Revenue Bureau against its method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs; although it did not appear that any one in behalf of the claimant corporation ever, after its organization, made any such protest or objection, or

any claim on account thereof, until January 8, 1879. On that date the appellant caused a letter to be written to the commissioner, asserting its claim for the amount afterwards sued for, as due on account of the commissions on stamps purchased. To this, on January 16, 1879, the commissioner replied, saying that the appellant had received all commissions upon stamps to which it was entitled 'provided the method of computing commissions, which was inaugurated with the first issue of private die proprietary stamps and has been continued by each of my predecessors, is correct. I have, heretofore, decided to adhere to the long-established practice of the office in this regard until there shall be some legislation or a judicial decision to change it.' And the claim was therefore rejected.

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law, upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money; that it regulated all its forms, modes of business, receipts, accounts, and returns upon that interpretation of the law; that it refused on application, prior to 1866 and subsequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to appellant that unless it complied with the exaction it should not continue its business; for it could not continue its business without stamps, and it could not purchase stamps except upon the terms prescribed by the Commissioner of Internal Revenue. The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We cannot hesitate to answer that question in the

negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.*"

The authorities relied on by counsel for appellee are easily distinguishable from the case at bar. They cite *United States vs. Wilson* (168 *U. S.*, 273), where an administrator sought to recover the amount of certain unofficial fees which had been collected by his decedent, Van Buren, while consul-general of the United States at Yokohama and by him paid into the Treasury of the United States, along with moneys representing official fees collected by him. Van Buren's accounts, covering all fees collected by him, were settled at the Treasury Department, and in the settlement he was charged with the items in dispute as official fees. The Court of Claims found that it was not shown that Van Buren's reason for paying the fees in question into the Treasury was to avoid a controversy with any department of the government, or that he made any demand to have those fees refunded to him, or credited to him before his accounts were finally settled, or that before the final settlement of his accounts at the Treasury Department he made any objection or protest against said fees being charged to him as official fees. The Court of Claims gave judgment for the claimant, relying upon the decision of this court in the case of *United States vs. Mosby* (133 *U. S.*, 273), but on appeal by the United States this court said:

"We are not now called upon to question the decision in the Mosby Case. We think there is another ground upon which to base a reversal of the judgment herein, which is, that the payments made by Mr. Van Buren of the fees covered by his claim where wholly volun-

tary, and that the general rule applicable to voluntary payments should be enforced.

"The petition in this case was not filed until the 30th of March, 1888, and Mr. Van Buren's term of service expired in June, 1885. From the commencement of that service in 1874 up to the termination of his office and the final settlement of his accounts, no whisper of any claim on his part against the government was ever heard from Mr. Van Buren. It does not appear that he had the least doubt that the government was entitled to all the fees paid over by him to it, and in all the various settlements of his accounts with the Treasury Department, and in his correspondence, so far as this record shows, no claim was ever made or hint given on his part that he had the least title to retain these fees or to recover them back if paid to the government. There is no pretence that he paid the fees into the treasury to avoid a controversy with any department of the government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so finds in substance. If a voluntary payment can be made to the government, it seems to us that this is *such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official of the government, we think the payments made by the original claimant were voluntary.* This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; *nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress.* The facts show nothing but a voluntary payment of money to the government, without claim of any right to retain one penny of it."

Distinguishing the Van Buren claim from those drawn in question in the cases of *United States vs. Lawson* (101 *U. S.*, 164) and *United States vs. Ellsworth* (101 *U. S.*, 170), the opinion proceeded:

"In United States vs. Lawson the collector received

an order in writing from the commissioner of customs, his superior, requiring him to account for all fees received by him as collector. Under that order he paid the fees in controversy into the treasury, and it was held that having thus paid them pursuant to a peremptory order of his superior officer, he was not precluded from thereafter recovering them in a suit against the United States.

"To the same effect is United States vs. Ellsworth, where the ruling in the Lawson Case is followed. In the Ellsworth Case the court said, after referring to the penalties for noncompliance with the requirements of the law in paying over moneys: 'Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner.'

"In both of the cases, in addition to the general law upon the subject of moneys received for the use of the United States to be paid into the Treasury, there was a distinct and peremptory order that the moneys in question should be paid, and it was in compliance with such order from a superior officer that the moneys were paid."

Counsel for the United States cite also the case of *United States vs. Edmonston* (181 *U. S.*, 500), where the claimant sought to recover money paid by him for public land on which he had located under the pre-emption laws, in excess of the price fixed by statute. When claimant made his cash entry he made no objection to the receiver at the local land office and did not assert any right to purchase the land at a smaller price than he was called upon to pay. At the time of the entry there was no mistake made with respect to the location of the land. Thereafter he applied to the Land Department for return of the money paid by him in

excess of the sum representing the purchase price of the land at the legal rate. The application was refused and claimant brought suit in the Court of Claims, basing his right to the refund upon a clause of the act of June 16, 1880 (21 Stat. L., 287), which read:

> "And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall, in like manner, be repaid to the purchaser thereof, or to his heirs or assigns."

This court had already decided (*Medbury vs. United States*, 173 *U. S.*, 492) that the act of 1880 referred only to cases where a mistake with respect to location was made at the time of entry and adhered to that ruling in the Edmonston case, saying:

> "The act of June 16, 1880, may, therefore, be put out of consideration."

This left claimant without rights save those derived from the general law, and the court held that under the general law the payment made by the claimant was voluntary and no part of it recoverable. It said this, however:

> *"That Congress has power in all cases to waive the question of voluntary payment and provide that any mistake shall be corrected and any excess of payment refunded by the officer receiving it, or recovered by an action in the Court of Claims is undoubted; that, as shown by these references, it has made provision in certain cases for a refunding by the department which has received the money is obvious, and provided for such refunding irrespective of the question of voluntary payment.* Now counsel would draw the inference that the question of voluntary payment has been waived by Congress in all cases of transactions between the gov-

ernment through its administrative officers and private individuals, except in customs cases, and that, if there be no specific provision for refunding by the department in which the mistake has occurred, the party may come into the Court of Claims and enforce his right to recover. Our conclusion is directly to the contrary, and that Congress, *recognizing the rule of voluntary payment, believe that in certain instances it ought not to be enforced, and that the department which received money in excess of the legal charge or price should refund, and so legislated, intending to leave all other cases subject to express statutory requirement of protest, or to the ordinary well-established rule as to the effect of voluntary payment.*"

Unlike the claim drawn in question in the Wilson case (*supra*) the claim of the Merchants National Bank, now in suit, is not founded upon payments of a purely voluntary character, made without any demand or requirement whatsoever on the part of the government, but upon payments made in obedience to demands by the Treasury of the United States, for payment of taxes assessed by him, and the disregard of those demands would have subjected the claimant to various penalties and forfeitures, over and above the amount of taxes beside depriving it of the interest payable on its bonds, which were held by the Treasury Department.

Unlike the claim drawn in question in the Edmonston case (*supra*) the one now in suit is not dependent upon the general rules of law, but is founded upon a statute (Sec. 5218 R. S., *supra*) whereby Congress waived the question of voluntary payment and provided that any money paid by a national bank, in excess of the duties, lawfully collectible on its notes in circulation, should be refunded. Furthermore Edmonston's claim was founded upon an alleged excessive payment made for land which he purchased from the government. He was under no requirement to make the purchase. Whereas the present claimant is seeking to re-

cover money, assessed and collected as taxes without warrant of law.

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